Majlis Agama Islam Negeri Pulau Pinang v Zaitun bt Ramli

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–219 OF 2002
SURIYADI, ZAINUN ALI AND HASAN LAH JJCA
11 SEPTEMBER 2008

Civil Procedure — Appeal — Respondent — Respondent or counsel absent at appeal — Whether appellate court would automatically allow appellant's appeal — Whether court could dismiss appellant's appeal for lack of merits, notwithstanding respondent's absence

Land Law — Title — Indefeasibility of title — Registered owner of land a bona fide purchaser with value — No evidence of fraud or misrepresentation — Whether registered owner had good title

The deceased's half-share in a piece of land ('the land') was transferred to the appellant pursuant to a faraid order dated 14 April 1999. The appellant then realised that the land was registered in the name of the respondent. Being aggrieved, the appellant filed a writ and statement of claim on 4 August 1999 against the respondent, praying that the registration of the respondent as the registered owner, be declared void and the appellant be registered as the new registered owner. The respondent filed her appearance but then filed her defence late. The appellant applied, inter alia, to strike out of the respondent's defence for being out of time, and for a declaration that the registration of the respondent as the new owner be declared null and void. The senior assistant registrar ('SAR') allowed the appellant's application to strike out the defence, but the application for the declaration came before the judge. The judge found that the appellant had merely filed a bare supporting affidavit, which did not divulge whether the respondent was aware of any dealing pertaining to the land, or had collaborated with the previous registered owner in the transaction. Further, there was nothing in the statement of claim indicating that the respondent knew that the previous owner was not the original registered owner, or had conspired with the previous owner to defeat the legal rights of the deceased. The respondent however filed an affidavit affirming that she had bought the land from its rightful registered owner and that she was a bona fide purchaser with value without notice of any defective title. She claimed she had no idea whether the deceased and the registered owner she dealt with were different persons. The judge dismissed the application with costs and the appellant appealed to the Court of Appeal. In the Court of

Appeal, neither respondent nor counsel appeared. The court nevertheless proceeded with the merits of the appeal.

Held, dismissing the appeal:

(1) The appellant's case was flawed. No action was undertaken by the appellant under the statement of claim, to obtain a default judgment against the respondent for want of defence after the SAR had struck out the defence. Instead, the appellant wanted a judgment in default of the prayers in the statement of claim through its summons in chambers (see para 12).

(2) The respondent was the registered owner of the land, and unless the appellant could prove that she was a party or privy to fraud or misrepresentation, she had a good title against the whole world pursuant to s 340 of the National Land Code. In the instant case, the appellant had failed to establish fraud or misrepresentation by the respondent or her agent (see paras 13–14).

(3) The Court of Appeal could not allow the appellant's instant appeal notwithstanding the respondent's absence and want of defence. Assuming the High Court had allowed the application and supposing an appeal had been launched against the decision, the Court of Appeal would have certainly allowed such hypothetical appeal. In the instant case, the facts pointed to the futility of the application. Since the appellant's application lacked evidence, and the non-presence of the respondent did not guarantee the appellant an automatic win, the court would not hesitate to dismiss the appeal (see para 15).

[Bahasa Malaysia summary

Separuh daripada bahagian si mati dalam sebidang tanah ('tanah tersebut') telah dipindah milik kepada perayu menurut perintah faraid bertarikh 14 April 1999. Perayu kemudian menyedari yang tanah tersebut telah didaftarkan atas nama responden. Terkilan, perayu telah memfailkan writ dan penyataan tuntutan pada 4 Ogos 1999 terhadap responden, memohon pendaftaran responden sebagai pemilik berdaftar, diisytiharkan tidak sah dan perayu didaftarkan sebagai pemilik berdaftar yang baru. Responden telah memfailkan kehadirannya tetapi lewat memfailkan pembelaannya. Perayu memohon, antara lain, untuk membatalkan pembelaan responden kerana di luar tempoh masa, dan untuk perisytiharan bahawa pendaftaran responden sebagai pemilih pendaftar baru diisytiharkan batal dan tidak sah. Timbalan pendaftar kanan ('TKP') membenarkan permohonan perayu untuk membatalkan pembelaan tersebut, tetapi permohonan untuk deklarasi dibawa ke hadapan hakim. Hakim mendapati yang perayu telah hanya

memfailkan afidavit sokongan sahaja, yang tidak mendedahkan sama ada responden sedar tentang urusan berkaitan tanah tersebut, atau telah bekerjasama dengan pemilik berdaftar sebelumnya dalam transaksi itu. Bahkan, tiada apa-apa dalam penyataan tuntutan menandakan responden mengetahui yang pemilik sebelumnya bukan pemilik berdaftar asal, atau telah berkomplot dengan pemilik sebelumnya untuk menyangkal hak-hak sah si mati. Responden walau bagaimanapun telah memfailkan afidavit mengesahkan yang dia telah membeli tanah tersebut daripada pemilik berdaftar yang sah dan bahawa dia pembeli bona fide bernilai tanpa notis apa-apa hak milik yang cacat. Dia mendakwa yang dia tidak ada pengetahuan sama ada si mati dan pemilik berdaftar yang dia telah berurusan merupakan orang yang berbeza. Hakim telah menolak permohonan dengan kos dan perayu telah merayu ke Mahkamah Rayuan. Dalam Mahkamah Rayuan, responden mahupun peguam tidak hadir. Mahkamah walau bagaimanapun telah meneruskan dengan merit rayuan.

Diputuskan, menolak rayuan:

(1) Kes perayu ada cacatnya. Tiada tindakan telah diambil oleh perayu di bawah penyataan tuntutan, untuk memperoleh penghakiman ingkar terhadap responden kerana ketiadaan pembelaan setelah PKP membatalkan pembelaan. Sebaliknya, perayu inginkan penghakiman ingkar terhadap permohonan dalam penyataan tuntutan melalui saman dalam kamar (lihat perenggan 12).

(2) Responden adalah pemilik berdaftar tanah tersebut, dan kecuali perayu boleh membuktikan yang dia adalah pihak atau privi kepada fraud atau salah nyata, dia mempunyai hak milik yang baik menurut s 340 Kanun Tanah Negara. Dalam kes ini, perayu telah gagal untuk membuktikan fraud atau salah nyata oleh responden atau agennya (lihat perenggan 13–14).

(3) Mahkamah Rayuan tidak membenarkan rayuan perayu ini meskipun ketidakhadiran responden dan ketiadaan pembelaan. Dengan andaian Mahkamah Tinggi membenarkan permohonan dan kalau rayuan telah dikemukakan terhadap keputusan itu, Mahkamah Rayuan semestinya membenarkan rayuan hipotesis. Dalam kes ini, fakta menunjukkan permohonan itu sia-sia. Memandangkan permohonan perayu tidak mempunyai keterangan yang mencukupi, dan ketidakhadiran responden tidak menjamin perayu kemenangan automatik, mahkamah tidak teragak-agak untuk menolak rayuan itu (lihat perenggan 15).]

Notes

For cases on indefeasibility title, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4578–4581.

A For cases on respondent generally, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1441–1443.

Cases referred to

Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ
B 241 (refd)
Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393 (refd)
Bank Pertanian Malaysia v Blue Valley Plantation Bhd & Ors [2002] CLJ 100 (redf)
C *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21 (refd)

Legislation referred to

National Land Code s 340
D Rules of the High Court 1980 O 19 r 5(1)

Appeal from: Civil Suit No 22–606 of 1999 (High Court, Pulau Pinang)

E *Andrew Teh (Foong Mun Yee with him) (Wong Lu Peen & Tunku Alina) for the appellant.*
Jasvinjit Singh (AJ Ariffin Yeo & Harpal) for the respondent.

Suriyadi JCA (delivering judgment of the court):

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[1] The appeal was brought before us by the Majlis Islam Negeri Pulau Pinang ('the appellant'), but despite the non-presence of the respondent, and despite the respondent's defence having been struck out earlier, we still
G dismissed it. The reasons are manifold but to understand fully the issue at hand a need arises for us to reproduce the facts of the case.

[2] One Che Dun bt Lebai Mamat was the registered owner of one half share of a piece of land referred to as Lot 2561, Mukim 4, Daerah Seberang
H Perai Utara, Pulau Pinang ('the land'). She then passed away on 2 December 1979. On 5 April 1999 the Shariah Court of Kepala Batas pursuant to a faraid order meted down the order that the deceased's half share of the land be transferred to the appellant.

I **[3]** The appellant then realised later that sitting on the land was a new registered owner ie the defendant ('the respondent'). Being aggrieved the appellant filed a writ and statement of claim on 4 August 1999 against the respondent and successfully served them on her on 30 August 1999. Amongst others, the appellant prayed that the registration of the respondent as the

registered owner, be declared void and the appellant be registered as the new registered owner. The respondent thereupon filed her notice of appearance and defence.

[4] The appellant thereafter filed a summons in chambers, inter alia, praying for a striking out of the respondent's defence for being out of time, and a declaration that the registration of the respondent as the new owner be declared null and void. Before the senior assistant registrar the appellant was successful in striking out the defence. For some unknown reason no appeal was filed against this part of the order. As for the declaration application the matter was dealt with by the learned High Court judge.

[5] A scrutiny of the appellant's supporting affidavit merely affirmed that:

(i) the person who affirmed the supporting affidavit was an officer of the appellant;

(ii) a writ of summons and statement of claim were served on the respondent;

(iii) the respondent had filed a notice of appearance but had filed an out of time defence; and

(iv) the Shariah Court of Kepala Batas had given the share of Che Dun bt Lebai to the appellant.

[6] Nothing was stated in this supporting affidavit, of whether the respondent was aware of any dealing pertaining to the land, or had collaborated with the previous registered owner in the transaction. It was a bare supporting affidavit with no indication of the respondent's culpability.

[7] The gaps in relation to the land were filled up by the respondent's affidavit in reply. She had affirmed that she had executed a sales and purchase agreement dated 25 August 1997 with one Dun bt Man, who was the then registered owner of the land, for a sum of RM30,000. Thereafter on 19 December 1998 she became the new registered owner for value. At para 9 of her affidavit she stated that she had no idea that Che Dun bt Lebai Mat had died way back on 2 December 1974. As far as she was concerned Dun bt Man was the rightful registered owner and the sale was bona fide. In a word she was a bona fide purchaser with value without notice of any defective title. In the alternative she had indicated that she had no idea whether Che Dun binti Lebai Mat and Dun bt Man were two different people. She thereupon prayed that the summons in chambers be dismissed with costs.

[8] A perusal of the statement of claim likewise told a similar story as that affirmed by the appellant's supporting affidavit in the summons in chambers. Nothing in the statement of claim indicated that the respondent knew Dun bt Man was not the original registered owner, or had conspired with her, to defeat the legal rights of the deceased.

[9] Not surprisingly the learned judge had dismissed the application with costs. Being dissatisfied the appellant filed an appeal hence the matter before us.

[10] At the hearing date the respondent was not present despite being informed of the appeal. Even her counsel was not present. Not a shred of evidence was made available to us to explain their respective absence. As they had been sufficiently informed we proceeded on with the merits of the appeal.

[11] The appellant had submitted that the learned judge was wrong in law in dismissing the appellant application as the learned judge did not consider the order of 21 August 1999 made by the senior assistant registrar, which had struck out the respondent's statement of defence. The effect was that the respondent was left with no defence at that material time. Pursuant to O 19 r 5(1) of the Rules of the High Court 1980, the appellant thus was entitled to enter judgment for possession as prayed in prayer 2 of the summons in chambers. This provision reads:

> 5 Default of defence: Claim for possession of immovable property (O 19 r 5)
>
> (1) Where the plaintiffs claim against a defendant is for possession of immovable property only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, and on producing a certificate by his solicitor, or (if he sues in person) an affidavit, stating that he is not claiming any relief in the action of the nature specified in Order 83 rule 1, enter judgment for possession of the immovable property as against that defendant and for costs, and proceed with the action against the other defendants, if any.
>
> (2) ....

[12] In the course of it the court became increasingly aware of the flaws in the case of the appellant. To begin with, no action was undertaken by the appellant under the statement of claim, to obtain a default judgment against the respondent for want of defence after the senior assistant registrar had struck out the defence. Instead the appellant wanted a judgment in default of the prayers in the statement of claim through the summons in chambers.

[13] It was also crystal clear that the respondent was now the registered owner, and unless the appellant could prove that she was a party or privy to fraud or misrepresentation, she thus had a good title against the whole world (s 340 of the National Land Code; *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241). This provision of s 340 reads as follows:

> 340 Registration to confer indefeasible title or interest, except in certain circumstances
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> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
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> (2) The title or interest of any such person or body shall not be indefeasible —
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy;
>
> (b) ....
>
> (c) ....
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) —
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted there out shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

[14] Even if fraud existed it was never established against anybody; and even if forgery had been committed by Dun bt Man it was never affirmed in the affidavit in support. As mentioned above, the supporting affidavit of the appellant was silent as to the active commission of fraud or misrepresentation by the respondent or her agent. Further there was no affirmation by the appellant alleging that the respondent was not a purchaser of good faith. In fact the only impression created by the appellant was that the conduct and mindset of the respondent was unblemished and had remained so up to the day of the registration. The sales and purchase agreement established beyond doubt that the transaction was for valuable consideration ie for RM30,000.

Unless the demands of s 340 of the National Land Code were met the title of the respondent stays. Here the appellant had failed, as from the evidence it was conspicuously obvious that this was a shoddy attempt at wanting to deregister the respondent, as the rightful owner.

[15] Should the court allow the appeal when the respondent was not present during the appeal compounded further by the want of defence? To address this question, the easiest way to resolve it is to pose the supplementary and hypothetical question of what if the learned trial judge had allowed the appellant's application. Were a consequential hypothetical appeal brought before the Court of Appeal, the appeal would certainly be allowed, on the simple ground that the facts would point to the futility of the application. From the prognosis of the facts, as carried out above, it was well nigh impossible for the applicant to establish, on a balance of probability, the basic ingredient of the respondent possessing a culpable mind, or at worst being aware that Dun bt Man possessed a defective title (*Bank Pertanian Malaysia v Blue Valley Plantation Bhd & Ors* [2002] CLJ 100; *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241). There was nothing in the evidence to point to the contract between Dun bt Man and the appellant to be contaminated and illegal and hence void and unenforceable (*Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21; *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393). At the appeal stage the hypothetical order, it being bad, would almost certainly be set aside.

[16] With that vivid scenario staring at us, and justice being uppermost in our mind, the correct position to take was to carry on with the appeal, with or without the presence of the respondent. Down below, the learned trial judge after having heard both parties and having weighed the evidence, had correctly found for the respondent. The situation was no different before us. The application regretfully lacking in evidence, and the non-presence of the respondent not guaranteeing an automatic win, we had no compunction in dismissing the appeal.

Appeal dismissed.

Reported by Andrew Christopher Simon